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TRANSCRIPT OF PROCEEDINGS

JUN - 1 1993

Before the

FEDERAL COMMUNICATIONS COMMISSION

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JUN - 1 1993

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN RE:

APPLICATIONS FOR

Waimea, Hawaii

MM DOCKET NO. 93-53

The above-entitled matter came up for a pre-hearing conference pursuant to Notice before Joseph P. Gonzalez, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C. in Courtroom No. 4, Wednesday, May 19, 1993 at 9:00 a.m.

APPEARANCES:

On Behalf of KR Partners

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Washington, D.C. 20036

On Behalf of the Chief, Mass Media Bureau

JAMES M. SHOOK, Esquire

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25	Conference Began: 9:00 a.m.	Conference Ended: 9:26 a.m.

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P R O C E E D I N G S

JUDGE GONZALEZ: The date is May 19th, 1993, and the time is 9:00 a.m. in the morning. This is a pre-hearing conference regarding the matter of the mutually-exclusive applications of KR Partners, KES Communications, Inc., and Lori Lynne Forbes, for a construction permit for a new FM station to operate on Channel 256C in Waimea, Hawaii. Would the parties present their appearance beginning on my left?

MR. TEPPER: Good morning, Your Honor. This is Cary Tepper for KES Communications, Incorporated.

MR. VAN BERGH: Mark Van Bergh of the firm Waysdorf & Van Bergh on behalf of KR Partners.

MR. ALPERT: Dan Alpert on behalf of Lori Lynne Forbes.

MR. SHOOK: James Shook on behalf of the Chief, Mass Media Bureau.

JUDGE GONZALEZ: All right. Thank you very much. As you know, the procedural dates were set by my pre-hearing conference order issued on March 23rd, 1993. The only thing that I note is that on June 7th, 1993, the preliminary hearing data is due. I guess all the parties are aware that if they on further reflection come to the conclusion that there are no significant differences in the areas and pops that we would also entertain a joint stipulation that would be filed on that same date indicating that there is no, no significant difference. I don't know whether you feel that -- or you are

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1 already convinced that there is a significant difference but
2 I, I wanted to make that clear since the, since the order did
3 not provide for that. Are there any questions with respect to
4 the procedural dates?

5 MR. VAN BERGH: On that June 7 date, Your Honor, we
6 have met and agreed to try and have a joint exhibit prepared
7 and have undertaken to try and get estimates from various
8 engineers on the preparation of the exhibit. Unfortunately,
9 some of the engineers we've contacted have been very slow in
10 getting us their estimates and in the event that the engineer
11 ultimately chosen is unable to meet the June 7 date I'm
12 wondering if there -- we could get your feelings right now on,
13 on perhaps getting an extension of that June 7 date as well as
14 bringing it to the attention of the Mass Media Bureau to get
15 their feelings. I know that the Bureau likes to review those
16 exhibits and, and provide their comments to the engineer
17 should there be any questions.

18 JUDGE GONZALEZ: You're right. I think it's really
19 more a concern of, of the Bureau than mine, frankly.

20 MR. VAN BERGH: I also note that the final engineering
21 exchange date I believe is June -- July 23rd so it would seem
22 that there is plenty of time in that interval --

23 JUDGE GONZALEZ: Right.

24 MR. VAN BERGH: -- to, to make sure that the exhibit --

25 MR. SHOOK: There is, there is a good deal of

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1 flexibility there.

2 JUDGE GONZALEZ: All right, surely. Well then, I
3 certainly don't have any objection, Mr. Van Bergh. Obviously
4 we'd like it as close as possible to that date, but yes.
5 Anything further?

6 MR. SHOOK: We would certainly appreciate, you know,
7 your getting it to us June 7. If it turns out it has to be a
8 week to or ten days after that we could probably live with
9 that with no problem.

10 MR. TEPPER: Well actually, we -- all of us will be out
11 of town for depositions on that date so that poses another
12 minor problem, you know --

13 JUDGE GONZALEZ: Yeah, I note that what -- they're
14 scheduled the 7th and the 8th?

15 MR. TEPPER: 7th, 8th, maybe into the 9th.

16 JUDGE GONZALEZ: All right. Okay. I received on

1 on that last Thursday so I think realistically everything is
2 ripe for, for you because right now the depositions
3 technically speaking are scheduled for Friday.

4 JUDGE GONZALEZ: Right, right. Well, I, I -- my
5 feeling just having reviewed the, the motion and the argument,
6 that it should be granted. I, I don't see any reason to, to
7 depose this gentleman, the reason being that I, I, I don't
8 think that the issue that was designated by the hearing
9 designation order is that broad. I believe that I permitted
10 certain documents to be, to be produced which I guess at
11 first, first brush may appear to contradict that, but I don't
12 think they do. What I'm interested in knowing is what was the
13 basis for the certification as of the date of the filing of
14 the application and I understand it was Mr. -- I assume it was
15 Mr. Handgis' letter. That probably as far as I'm concerned is
16 the -- that's got to be produced; I mean, Mr. Handgis' letter
17 or any supporting materials that would relate to, to that
18 commitment -- to that financial commitment. Other than that,
19 I don't, I don't really see what else would be pertinent.

20 MR. ALPERT: Well, Your Honor?

21 JUDGE GONZALEZ: Yes, sir?

22 MR. ALPERT: That does bring up a point though insofar
23 as, you know, we haven't been able to get supporting materials
24 that we've been attempting to get. So far Mr. Handgis has
25 been unwilling to --

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1 JUDGE GONZALEZ: Well, that's, that's my problem.

2 MR. VAN BERGH: That is -- Your Honor, that's not true.

3 JUDGE GONZALEZ: I don't think, I don't think the
4 supporting -- first of all, I'm not really convinced that the
5 supporting materials to the extent to which you seek them here
6 are really relevant. I don't, I don't think the Commission
7 has required it. I think if the letter is pretty -- on its
8 face appears to be a reasonable basis to make the
9 certification I think that probably does it.

10 MR. ALPERT: Well, that's misrepresentation though,
11 Your Honor.

12 MR. VAN BERGH: Your Honor, if I, Your Honor, if I
13 could --

14 JUDGE GONZALEZ: There is no misrepresentation issue
15 that --

16 MR. ALPERT: That's, that's, that's my point. That's
17 the only thing that the letter addresses. Certainly the
18 letter itself shows that there possibly was no
19 misrepresentation by the applicants insofar as maybe she had a
20 good-found belief to think that she could be certified by Mr.
21 Handgis's zero dollars then in actuality she was not
22 financially qualified.

23 MR. VAN BERGH: Your Honor, if I could address this?

24 JUDGE GONZALEZ: Surely.

25 MR. VAN BERGH: Number one, Mr. Alpert said that Mr.

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1 Handgis has not cooperated. Number one, that's not in fact
2 the case. The motion for production of documents or the
3 subpoena for documents that was served on him is what was
4 opposed. The -- and, and it may be that Mr. Alpert is
5 referring to a situation with B.D.C. Services and Mr. Marikian
6 where there has been some questions and, and there's been some
7 correspondence between us. But as far as Mr. Handgis goes,
8 not only was his letter to KR Partners, or at the time, Julie
9 O'Conner, produced, so was his financial statement, so was a

1 JUDGE GONZALEZ: And one --
2 MR. VAN BERGH: -- opposition --
3 JUDGE GONZALEZ: -- to quash the oral deposition?
4 MR. VAN BERGH: Right, and I would also note, Your
5 Honor, that Mr. Alpert I guess submitted last Thursday or
6 sometime last week the service copy of the subpoena for Mr.
7 Handgis to appear at the deposition --
8 JUDGE GONZALEZ: Well, I'm granting both.
9 MR. VAN BERGH: -- along with documents.
10 JUDGE GONZALEZ: I'm granting both the motion to quash
11 the subpoena as well as the request for -- that he present
12 certain documents. I believe that was the other. Am I not
13 correct?
14 MR. VAN BERGH: That was the other pleading that was
15 filed.
16 JUDGE GONZALEZ: Right.
17 MR. VAN BERGH: There was a subsequent subpoena that
18 was received for him to appear at deposition --
19 JUDGE GONZALEZ: Right.
20 MR. VAN BERGH: -- and I assume it's part of
21 your --
22 JUDGE GONZALEZ: Right. I'm granting both.
23 MR. VAN BERGH: Okay.
24 JUDGE GONZALEZ: The one that I issued on the 20th of
25 April, 1993, which was the one seeking the, the documents.

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1 And then the other one which was -- don't know the exact date
2 of the other one.

3 MR. VAN BERGH: I don't have that here either, Your
4 Honor.

5 JUDGE GONZALEZ: Well, the deposition was to go forward
6 on -- I don't have that date -- do you know, Mr. Alpert,
7 offhand?

8 MR. ALPERT: The date of?

9 JUDGE GONZALEZ: The subpoena that -- for, for Mr. --
10 ad testificandum -- Mr. Handgis?

11 MR. ALPERT: Offhand, I do not.

12 JUDGE GONZALEZ: Anyway, that -- whatever date that is
13 that one is also quashed. And also too I received on, on
14 May 14th, 1993 a motion to compel again directed to KR to
15 produce the documents identified in Question No. 18 and 19 as
16 set forth in the request for production for documents served
17 on May 19th, 1993. My reading of the rules, I don't, I don't
18 know whether anyone here has a different opinion, but my
19 reading of the rules is that it does not -- that the rules do
20 not provide for response to the motion to compel in such a
21 situation. I don't know whether anyone else is very familiar
22 with that particular rule. Mr. Tepper?

23 MR. TEPPER: I -- my interpretation is in agreement
24 with yours, Your Honor.

25 JUDGE GONZALEZ: Yeah. I don't -- I guess the

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1 rationale is that there's already been a response to the
2 request for the production of documents and ergo there would
3 be no reason to, to respond to the motion to compel, I gather,
4 but the rule does not specifically provide for it.

5 MR. VAN BERGH: Your Honor, if I could address? I, I,
6 I certainly understand your interpretation. I think the
7 Commission was, was less than clear in when they modified the,
8 the hearing procedures concerning the production of documents.
9 It strikes me that, that if you look at Section 1.325 what it
10 talks about in terms of is filing a response or objection to
11 the production and then if a party seek -- desires to continue
12 to seek documents or thinks that, that full production has not
13 been complied with that they have the option or opportunity to
14 file a motion to compel, and under 1.294 it seems that an
15 opposition to that motion is permitted. I understand that
16 Your Honor certainly in this case once before ruled on the
17 motion to compel and, and I understand your reading. I, I
18 think its, its less than abundantly clear but I'm not -- I
19 can't --

20 JUDGE GONZALEZ: Yeah. It bothers me a bit, quite
21 frankly because I'm not sure whether it was an oversight or as
22 you say they -- we were meant to refer to another, another
23 section by inference, I, I, I don't know. But I will look
24 again at those two sections, but as of my last reading -- yes,
25 Mr. Alpert?

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1 MR. ALPERT: Just my own thinking as a matter of
2 policy, that as you point out to the extent that the other
3 side has a chance to oppose a motion and to the extent that
4 that -- the strength of that -- of that opposition, in other
5 words the legal merits or whatever that are contained within
6 that opposition, may make it totally unnecessary for a motion
7 to compel to be even filed because it so convinced the moving
8 party that documents will not be granted or would not be
9 warranted or whatever. So it seems to me that under
10 Commission policy it would be appropriate that all arguments
11 be presented in the initial opposition to the other party
12 before the motion to compel is even filed and as you point out
13 then it would be wholly unnecessary to repeat everything in an
14 opposition to the motion to compel itself.

15 MR. VAN BERGH: The, the problem with that, Your Honor,
16 is that I think what -- some of what the Commission was trying
17 to do is to model its discovery procedures after what goes on
18 in, in civil proceedings where discovery really commences
19 including production of documents upon the filing of the
20 complaint and you don't need to go to an official body, the
21 judge, to get an order producing documents which used to be
22 the Commission's procedure.

23 JUDGE GONZALEZ: Right. That, that seems to be the
24 direction that --

25 MR. VAN BERGH: And, and in a civil case when, when a

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1 party is served with a production request it's not required to
2 give every legal reason why the documents should not be
3 produced or relevant or whatever, it simply will lodge its
4 objection or will comply with the request and it then falls
5 back to the moving party to --

6 JUDGE GONZALEZ: Right.

7 MR. VAN BERGH: -- if it desires to move to compel
8 production.

9 JUDGE GONZALEZ: Right. Well, I guess that's the
10 problem with having sort of a hybrid like we have here,
11 procedure. Some things get left out perhaps or certain things
12 are intended which are not specifically stated. But in any
13 case, I've read, I've read the, the documents sought both in,
14 in 18 and 19 and as far as I'm concerned they're far too
15 broad, number one, and I think that any relevant information
16 that -- and I think there might be very well some information
17 which would be relevant could be elicited from the cross-
18 examination of Mrs. -- Ms. O'Connor I guess it is. So I will
19 also grant -- rather, I will deny that motion to compel that
20 was filed by Forbes on May 14th, 1993. Is there anything
21 further that anyone would like to discuss? Yes, Mr. Alpert?

22 MR. ALPERT: One problem which is -- hasn't been really
23 worked out between Mr. Van Bergh and myself right now has to
24 do with B.D.--

25 JUDGE GONZALEZ: B.D.C.?

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1 MR. ALPERT: -- B.D.C., the financing source on which
2 KR Partners currently is relying. In other words, this is the
3 -- squarely within the scope of the issue --

4 JUDGE GONZALEZ: Right, right. Sorry, B.D. what?

5 MR. ALPERT: B.D.C. Services.

6 MR. VAN BERGH: B.D.C. Services, Incorporated.

7 MR. ALPERT: That's right. As it stands right now,
8 certain documents were requested to back up basically the, the
9 numbers that were provided in a certain financial statement
10 that was provided of the company -- by the company through
11 counsel. It was requested that certain backup information be

1 produced in response to the, the production request. I was
2 advised by Mr. Marikian of, of B.D.C. Services that it was not
3 its intent to provide any additional documents. Obviously,
4 B.D.C. is not a party to the, to the case and I don't
5 represent B.D.C. And KR Partners has to deal obviously with
6 this problem as well and, and has to determine what impact
7 this -- these, these events have on its case and how it's
8 going to be able to go forward --

9 JUDGE GONZALEZ: Well, that's, that's certainly my
10 impression as well, yeah.

11 MR. VAN BERGH: -- go forward in terms of meeting the
12 issue and it is endeavoring to do that. As far as the
13 situation with the subpoena goes and the deposition, Mr.
14 Marikian who Mr. Alpert noticed for deposition thus far has
15 indicted that he will appear at his deposition which I think
16 is scheduled for the Friday, June 10 or 11, whatever the
17 actual date is, at 1 p.m. in California. At this point I have
18 no information that he's not going to, going to appear at the
19 deposition. I assume as Mr. Alpert stated that, that B.D.C.'s
20 position on documents won't change although I don't know that.
21 And I guess my view is that as far as the subpoena goes I'm
22 sort of out of the loop on that. I don't represent B.D.C.,
23 it's not a party to the proceeding and, and I don't know that
24 there's anything I can do or that KR can do to, to get B.D.C.
25 to provide any additional documents.

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1 What was -- one thing I would add is that Mr. Alpert
2 and I had discussed the scope of the subpoena request. One of
3 the problems which B.D.C. had indicated to me is one of the,
4 the document requests, I think it was either four or five,
5 basically requested all documents which would support the
6 information in a financial statement. That literally
7 interpreted means every business document the company has and
8 Mr. Alpert and I had talked about trying to work out an
9 accommodation that would limit the scope of that request to
10 something that B.D.C. might be able to live with and then I --

11 JUDGE GONZALEZ: Wasn't there, wasn't there some
12 modification in the document request that I made at one point
13 or was --

14 MR. VAN BERGH: Your Honor, the, the --

15 JUDGE GONZALEZ: -- this was not --

16 MR. VAN BERGH: No, the, the -- your order modifying
17 request concerned document production directed to KR Partners.

18 JUDGE GONZALEZ: Oh, I see.

19 MR. VAN BERGH: This is --

20 JUDGE GONZALEZ: Okay, because generally in those
21 instances it seems to me representative documents should --

22 MR. ALPERT: In this case Mr. Van Bergh and I worked it
23 out.

24 MR. VAN BERGH: We -- yeah, we hadn't reached a point
25 where we said precisely what documents --

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1 JUDGE GONZALEZ: Well, I can certainly well understand
2 why a financial institution wouldn't want to bring in
3 virtually every financial document that it has, I mean it
4 would be physically impossible I'm sure.

5 MR. VAN BERGH: Right. We were --

6 JUDGE GONZALEZ: And also not necessary.

7 MR. VAN BERGH: Right. We were trying to work out the
8 scope of that and when I was advised of B.D.C.'s position and
9 I -- as Mr. Alpert says I advised him in a letter, I, I don't
10 remember when the letter was written, and at that point it
11 didn't seem that there was any further purpose for us to
12 discuss trying to limit the scope of that request, and in
13 fact, we haven't pursued that.

14 MR. TEPPER: Could, could the parties identify the
15 kinds of documents that have been produced and the ones that
16 have been refused?

17 MR. VAN BERGH: Well, a, a more -- a financial
18 statement dated I think it's February 28, '93, was produced as
19 was -- were two copies of I guess monthly statement accounts
20 for a securities account or investment account that B.D.C.
21 had -- from sometime in '92, I think around May or June of
22 '92, and the other one around February or March or something
23 of '93. There were some other -- I think it's basically
24 request number four which is the only one which is really sort
25 of up in the air at this point. I think --

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1 JUDGE GONZALEZ: Well, it seems to me that KR has got
2 the burden of proof here. I mean, if they don't come forward
3 with sufficient information to, to meet that burden it's their
4 loss isn't it, Mr. --

5 MR. ALPERT: Well, it's not only that, Your Honor.
6 Insofar as that I don't want to be in a position where they
7 claim that they have met their burden of evidentiary evidence
8 in documents that they provide at the hearing and yet I cannot
9 effectively cross-examine that information or know whether
10 that's all the information because I have not been able to
11 complete discovery through document production. In other
12 words, they can't provide what they want to and then hide the
13 rest so to speak to use a phrase that's sometimes used in --
14 in order words, you have to have full and complete discovery
15 within limits of course within negotiations that would have
16 occurred between Mr. Van Bergh and myself. But, you know,
17 it's like with a balance sheet for example, if the Commission
18 or any other body were to rely simply on a balance sheet,
19 well, I could write up a balance sheet right now that says
20 I'm, I'm a millionaire, multi-millionaire. If anyone checked
21 the underlying documents they would establish that I am not.
22 The thing is though if all of a sudden someone just takes the
23 stand and says yes, this is my money and there's been no
24 discovery --

25 JUDGE GONZALEZ: Well, I gather there has been some and

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1 if there hasn't been --

2 MR. ALPERT: There has been limited discovery, of
3 course --

4 JUDGE GONZALEZ: Well, I guess that's an argument
5 you'll make if we don't have all the information.

6 MR. ALPERT: Yeah, that's, that's the problem I'm in
7 right now insofar as that --

8 JUDGE GONZALEZ: But you'll have to identify documents
9 won't you?

10 MR. ALPERT: That are --

11 JUDGE GONZALEZ: I mean, there may not be any that -- I
12 mean, you'll, you'll have to identify have been produced,
13 correct?

14 MR. ALPERT: Of course, but I -- but I can't produce

1 MR. ALPERT: But anyway, the point is I guess, Your
2 Honor, is that I might have to ask your cooperation in
3 getting -- I, I guess the procedure when you have a subpoena
4 that's not complied with is to go through the U.S. Attorney's
5 office so I might have to seek your, your --

6 JUDGE GONZALEZ: Well --

7 MR. ALPERT: -- assistance in that respect.

8 JUDGE GONZALEZ: -- we'll deal with that if and when it
9 happens. Anything further?

10 MR. VAN BERGH: The only thing I would say, Your Honor,
11 I think is that, that everything that Mr. Alpert has stated is
12 something that KR has to consider in the amount of evidence
13 it's able and in a position to produce to meet the issue and,
14 and if it can't do that certainly I think Mr. Alpert's points
15 here can be raised at hearing. And I -- at this point frankly
16 I don't know where this is all going to lead with respect to
17 KR's showing under the financial issue. I've discussed the
18 situation with KR's principals and they understand the
19 circumstances and they are endeavoring to try and take steps
20 to, to, to resolve this situation one way or another and
21 hopefully that can be done in the very near term. At this
22 point, I, I -- one, I don't want to set forth any litigation
23 strategies that we may have. But I understand Mr. Alpert's
24 concern and, and I understand the position it, it places Your
25 Honor in and so I, I just think -- I don't know how it will

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1 all play out.

2 MR. ALPERT: Well, if I may make just one other
3 comment? Concern -- said that the situation might change and
4 they're working it out or whatever, we are getting closer and
5 closer to depositions and we have to prepare for depositions
6 and I need to have documents if they're going to be produced
7 or if they're not going to be produced they're not going to
8 be, but we can't all of a sudden be --

9 MR. VAN BERGH: I have no --

10 MR. ALPERT: -- inundated with documents at the last
11 second.

12 MR. VAN BERGH: -- I have -- yeah, I understand that.
13 I have no reason to believe that, that B.D.C. is -- will
14 change its position with respect to the document and the
15 subpoena for documents. You know, whether they -- you know,
16 I, I just can't -- the, the steps that, that KR is looking
17 at -- at this point don't necessary involve B.D.C.

18 JUDGE GONZALEZ: Well, I hope all requests will be
19 reasonable and that every effort will be made to try to get
20 the information that's necessary to resolve that issue. I
21 guess I have to pretty much leave it at that.

22 MR. VAN BERGH: I have -- for the record, I have had
23 several discussions with Mr. Marikian trying to get B.D.C. to
24 produce the documents.

25 JUDGE GONZALEZ: Well, I would gather that you're

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1 motivated in that direction.

2 MR. VAN BERGH: Yes, Your Honor.

3 JUDGE GONZALEZ: Anything further?

4 MR. TEPPER: Your Honor?

5 JUDGE GONZALEZ: Yes, Mr. Tepper.

6 MR. TEPPER: With respect to the depositions that are
7 coming up, they will be taking place in Hawaii and I believe
8 there is a six- or a seven-hour time difference. In the event
9 that counsel disagree on the relevancy of certain questions
10 normally we'd call the presiding judge or the chief judge's
11 office for a ruling.

12 JUDGE GONZALEZ: Right.

13 MR. TEPPER: I anticipate with the time difference that
14 that will not be conceivable. Could you suggest a procedure
15 that we should follow in the event that there is disagreement
16 so we don't have to go back there? I mean, possibly write
17 down questions and ask for a ruling and then have further
18 questioning by telephone or something like that?

19 JUDGE GONZALEZ: I really don't know. I guess we could
20 -- you could always do the, the additional questions, the ones
21 that are objected to, on a conference call.

22 MR. TEPPER: My point is, when --

23 JUDGE GONZALEZ: Although I don't know exactly, what is
24 the time -- I mean I know it's --

25 MR. VAN BERGH: It's a six-hour time difference.

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1 JUDGE GONZALEZ: But is it earlier or later or --

2 MR. VAN BERGH: They're six hours behind us.

3 JUDGE GONZALEZ: Six hours behind us.

4 MR. VAN BERGH: So when it's 9 o'clock out there it's
5 3 o'clock here.

6 JUDGE GONZALEZ: What about 4 o'clock in the afternoon
7 our time, we could deal with all objections? Would that be
8 possible each day?

9 MR. VAN BERGH: Well, the problem with -- on the, on
10 the second day that would work. On the first day we would
11 have had --

12 JUDGE GONZALEZ: First day --

13 MR. VAN BERGH: -- approximately one half hour of
14 depositions at that point.

15 JUDGE GONZALEZ: Yeah.

16 MR. TEPPER: What I'm trying to avoid is counsel being
17 so unreasonable because you are not available and that's
18 happened in the past not with these attorneys but it's
19 happened and I, I want to try to avoid that.

20 JUDGE GONZALEZ: Well, I'm open to suggestions if
21 anyone has a suggestion that they feel would, would work.
22 I'm, I'm prepared to be flexible, as flexible as I could be.

23 MR. VAN BERGH: Well, I --

24 MR. ALPERT: Well, fly him out.

25 JUDGE GONZALEZ: Terrific.

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1 MR. VAN BERGH: Well, it strikes me -- Your Honor,
2 yeah, well, a partial solution at least, any questions that
3 would arise on the first day could be phoned in --